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NEWSLETTER

Manufacturers and Retailers' Free Speech Rights Remain in Flux

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The question of whether the government may require companies to include government-preferred messaging and information in their communications remains hot and unresolved. A D.C. Circuit decision last month reached the opposite result as a year-earlier *en banc* decision from the same court. This highlights the uncertainty facing manufacturers, retailers, and advertisers. Ultimately, Supreme Court attention appears likely to be necessary. Congress, states, and agencies mandate all sorts of disclosures, from securities filing requirements to nutritional labeling. Some regimes are uncontroversial and unchallenged. Others may—and often are intended to—carry a stigma or alter consumer preferences. Litigation over meat labeling and a requirement that public companies characterize their products' use of "conflict minerals" shows that government and the private sector will continue to clash over mandated speech.

Recent D.C. Circuit Cases Have Approached Government-Mandated Disclosures Differently

Upholding USDA's Meat Labeling Rule

The first of the recent cases, *American Meat Institute v. United States Department of Agriculture*, decided *en banc* over a year ago, upheld a Department of Agriculture regulation that required disclosure on meat-product labels of the country where individual animals were raised and slaughtered. Prior cases in the D.C. Circuit had upheld government regulation of misleading advertisements. But in *American Meat*, the government conceded the labels were not misleading. Instead, USDA claimed that consumer interest in country-of-origin information justified mandated disclosures.[1]

Authors

Megan L. Brown
Partner
202.719.7579
mbrown@wiley.law

Practice Areas

Environment & Product Regulation

The legal issue presented was whether a lower standard of review—which makes it relatively easy for the government to defend a rule—should apply. In the leading precedent, *Zauderer v. Office of Disciplinary Counsel*,[2] the Supreme Court had applied the lower standard in upholding a state law that had compelled attorneys who advertise that fees are contingent to also disclose that costs are not—that is, the clients might have to pay costs, even if they lose.

To be sure, the First Amendment guarantees the right to speak or stay silent.[3] But in *Zauderer*, the Court found that a company's interest in not carrying "factual and uncontroversial" corrective disclosures was minimal, and such disclosures could be required in advertisements to prevent consumer deception.[4]

From that simple conclusion, things got more complicated. As governments have embraced varied "disclosure" obligations—from calorie counts to environmental regulation and graphic tobacco warnings—courts have struggled to identify when it is proper to apply *Zauderer*. Should it govern and effectively bless any potentially useful "commercial disclosures," as some would have it, or be limited to disclosures aimed at correcting deceptive advertising? The alternative to *Zauderer* is a more demanding scrutiny, requiring the government to prove a substantial government interest for regulation and that a more limited regulation would not be equally effective.[5]

This question was addressed by the *en banc* D.C. Circuit in *American Meat*. The court applied the *Zauderer* framework, even though there was nothing misleading about the meat labels absent the disclosure.[6] It found that the purpose of protecting commercial speech under the First Amendment was to provide consumer access to information. Because disclosures—unlike restrictions—provided additional information, the court found companies' interest in nondisclosure minimal, as long as the disclosure was factual and noncontroversial.[7] But by applying less demanding scrutiny in these new circumstances, the D.C. Circuit in effect narrowed companies' First Amendment rights and invited additional mandates.

Overturning SEC's Conflict Mineral Rule

The debate continued in litigation over a Securities and Exchange Commission (SEC) regulation, required in the Dodd-Frank Act, that required companies sourcing minerals from the Democratic Republic of the Congo to disclose on websites that products were not "conflict free."[8] On August 18, revisiting an earlier decision with the benefit of the *American Meat* case, a panel majority in *National Association of Manufacturers v. Securities and Exchange Commission* overturned the rule, finding in favor of the corporate speakers.[9]

The court found two reasons to reject the conflict-mineral rule. First, the information was not on advertisements (as in *Zauderer*) or at a product's point of sale (as in *American Meat*). Instead, the SEC rule required website and financial disclosures, and the panel majority found a stricter standard of review should apply. And under that standard, the SEC disclosure infringed on companies' free speech rights.[10]

This rationale—that a company seems to have weaker First Amendment interests when speech is more closely tethered to product sales—could prove important in future litigation. After this case, commercial speech far removed from the point of sale could receive more protection than the same speech in product advertisements.

Second, the court found that the required disclosure was controversial, and thus would fail even *Zauderer*'s lowest standard of review.[11] The court identified controversy about whether the conflict-mineral disclosure would improve humanitarian conditions in the Congo. Indeed, some critics contended the rule would worsen the crisis. According to the court, the evidence in support of the rule was too speculative. Equally troubling, the disclosure placed a scarlet letter around the neck of companies by "convey[ing] moral responsibility for the Congo war."[12]

Judge Srinivasan wrote an opinion dissenting from both conclusions. He criticized the majority for ignoring the full court's decision in *American Meat*, under which he would have applied *Zauderer*'s lower standard of review and found that the "conflict free" disclosure was no more objectionable than run-of-the-mill factual and noncontroversial disclosures routinely required by other laws.[13] But even if the more demanding standard applied, the dissent still thought the rule passed scrutiny.[14]

What Now?

The two recent D.C. Circuit opinions reconfigure battle lines in a circuit split on whether the government can compel disclosures on non-misleading commercial speech. For example, while the Third and Tenth Circuits appear to restrict the lowest standard of review to misleading advertisements, the D.C. Circuit has now joined the First and Second Circuits in applying the lower standard to even non-misleading advertisements.

For its part, the Supreme Court has never applied *Zauderer* outside the context of misleading advertisements, despite opportunities to do so. But its few decisions leave lower courts little "guidance on the permissibility and scope" of disclosures when speech is not misleading.[15]

The *National Association of Manufacturers* opinion also presents a second potential battle line. Supreme Court cases since *Zauderer* have declined to apply it beyond disclosures on voluntary advertisements. For instance, the Supreme Court has found that a company cannot be compelled to pay for an industry-wide advertisement to which it objects.[16] But *American Meat* addressed disclaimers on product labels and not voluntary advertisements. Arguably, therefore, it conflicts with these cases and is outside the narrow *advertising* exception of *Zauderer*.

This conflict already is being revisited in a challenge to a Vermont regulation requiring disclosure on labels of genetically modified ingredients.[17] And the SEC has been ordered to expedite a rule requiring oil and gas companies to disclose payments to foreign governments that likely will raise similar First Amendment issues.[18] Compelled disclosures in non-advertising contexts will require courts to consider whether the D.C. Circuit is correct that the constitutionality of a disclosure requirement depends in part on its connection to a sale or advertisement.

Until the Supreme Court offers further guidance, both of these issues likely will continue to differ across three-judge panels and regions. The *National Association of Manufacturers* case may present the first opportunity for clarification. The parties have until early October to determine whether to seek rehearing by the full court in the D.C. Circuit, and even longer to decide whether to appeal to the Supreme Court. In the meantime, product companies will continue to face burgeoning government mandates and informational obligations.

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[1] *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (*en banc*).

[2] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

[3] *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1977).

[4] *Id.* at 651.

[5] *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980).

[6] *American Meat*, 760 F.3d at 22-23.

[7] *Id.* at 26.

[8] For further background, see *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014).

[9] *Nat'l Ass'n of Mfrs. v. SEC*, No. 13-5252, 2015 WL 5089667 (D.C. Cir. Aug. 18, 2015).

[10] *Id.* at *3.

[11] *Id.* at *4-5.

[12] *Id.* at *7.

[13] *Id.* at *14, 16, 18.

[14] *Id.* at *19-20.

[15] *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., dissenting from denial of certiorari).

[16] *See United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

[17] *See Grocery Mfrs. Ass'n v. Sorrell*, No. 5:14-cv-117, 2015 WL 1931142 (D. Vt. Apr. 27, 2015).

[18] *See Oxfam America, Inc. v. SEC*, No. 14-13648 (D. Mass. Sept. 2, 2015).